UNITED STATES OF AMERICA

STATE OF LOUISIANA

SUPREME COURT OF THE STATE OF LOUISIANA

New Orleans, Monday, March 26, 1956

Court was duly opened, pursuant to adjournment. Present, Their Honors: John B. Fournet, Chief Justice, Amos Lee Ponder, Joe B. Hamiter, Frank W. Hawthorne, E. Howard McCaleb, Harold A. Moise and James D. Simon, Associate Justices.

ACTION BY THE COURT ON APPLICATIONS FOR REHEARING

Rehearings Were Refused in the Following Cases:

* * * * * * *

42,664

STATE OF LOUISIANA

v.

MICHAEL CALLIA and GEORGE HABENEY

Both applications for rehearing refused.

* * * * * * *

42,663

STATE OF LOUISIANA

v.

HAROLD F. MILLS and LENA VERNACI

Both applications for rehearing refused.

* * * * * * *

I, V. J. Courville, Clerk, Supreme Court of Louisiana, do hereby certify the above to be a true and correct extract from the minutes of this court.

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the court aforesaid, at the City of New Orleans, this the 18th day of June, A. D., 1956.

V. J. COURVILLE
Clerk, Supreme Court of Louisiana

Monday February 20, 1956

SUPREME COURT OF LOUISIANA

No. 42663

STATE of LOUISIANA

v.

HAROLD F. MILLS and LENA VERNACI

Appeal from the Criminal District Court, Parish of Orleans, Section "E"; the Honorable J. Bernard Cocke, Judge.

HAWTHORNE, J.

Harold F. Mills and Lena Vernaci were convicted of the crime of gambling denounced by Article 90 of the Criminal Code. Mills was sentenced to pay a fine of $500.00 and to serve one year in the parish prison, and in default of the payment of fine to serve six additional months. Lena Vernaci was sentenced to pay a fine of $305.00 and to serve six months in the parish prison, and in default of the payment of fine to serve three additional months.

For a proper understanding of the numerous bills of exceptions reserved we shall briefly summarize some of the facts in this case. In the early morning of October 22, 1954, Lena Vernaci was arrested by two police officers while she was alone in a room that she rented in a house at 1229 Simon Bolivar Street in New Orleans. At the time of the arrest the room contained a stove, table, chair, and light, but no other furniture. The arresting officers seized a large amount of lottery paraphernalia lying on the table, including two lottery lists giving the numbers drawn from the lottery wheel on Thursday, October 21, by a lottery company conducting lotteries called "Bag of Silver" and "Bag of Gold"; receipts to be issued to players; and record sheets showing plays or bets made by various players, some of which bore the

date of October 22. During the trial a woman named Hattie Tucker who lived at 1229 Simon Bolivar Street testified without objection that Lena Vernaci had used the room at that address for "writing lottery." Also, testimony and exhibits were offered by the State to prove that Harold Mills was the owner and operator of Gold and Silver, a lottery company, and that Lena Vernaci was a lottery vendor for Mills on the date charged in the information.

Article 90 of the Criminal Code, R. S. 14:90, provides:

"Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.

"* * * "

The pertinent part of the bill of information charging these defendants with violating this statute reads:

"Harold Mills and one Lena Vernaci * * * did commit the crime of gambling as defined by R. S. 14:90 in that each did unlawfully and intentionally conduct and directly assist in the conducting, as a business, at 1229 Simon Bolivar in the City of New Orleans, of a lottery, whereby a person risked the loss of a thing of value in order to realize a profit * * *."

Mills and Vernaci each filed an application for a bill of particulars. When their applications were denied by the trial judge, each defendant reserved a bill of exception, and Vernaci also reserved bills to the overruling by the trial judge of her demurrer and motion to quash the information. These bills are designated as Mills Bill No. 1 and Vernaci Bills Nos. 1, 2, and 3.

In their motions for a bill of particulars these defendants asked the State to tell each defendant whether he or she was charged with conducting and operating a lottery, or ony with assisting in the operation of a lottery; whether lottery operations were conducted at 1229 Simon Bolivar Street by each; what lottery opera-

tions each performed or took part in; where the lottery drawings took place; and other details with reference to the lottery operations.

The answer of the State, which the trial court deemed sufficient, informed the defendants that each was charged in the bill of information with conducting *and* assisting in conducting a lottery under the authority of R. S. 15:222, and that they were both charged as principals under the provisions of R. S. 14:24.

R. S. 15:222 provides that several distinct offenses, disjunctively enumerated in the same criminal statute, may be cumulated in the same count when it appears that they are connected with the same transaction and constitute but one act, but in that case they must be charged conjunctively. Under R. S. 14:24 all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

The primary function of a bill of particulars is to fully inform the accused of the nature and cause of the accusation against him so that he can adequately prepare his defense. However, a defendant in a criminal case is not entitled to particulars as a matter of right. The granting or refusal of such a bill is within the sound discretion of the trial judge, and his ruling will not be disturbed unless it is manifestly erroneous. Arts. 235 and 288, La. Code Cr. Proc., R. S. 15:235, 288; State v. Labat, 226 La. 201, 75 So. 2d. 333; State v. Simpson, 216 La. 212, 43 So. 2d. 585; State v. Poe, 214 La. 606, 38 So. 2d. 359; State v. Sheffield, 201 La. 1055, 10 So. 2d. 894; State v. Ezell, 189 La. 151, 179 So. 64.

In criticizing the denial by the trial judge of her motion for a bill of particulars, appellant Vernaci in brief in this court for the first time urges that she was entitled to know before tial the kind of lottery involved

in the charge against her. We note, however, that she did not seek this information in her motion for a bill of particulars, and even if she had, it would be without merit. The word "lottery" as used in Article 90 of the Criminal Code and in the bill of information in this case is neither vague nor indefinite. It is found in our state Constitution, Article 19, Section 8, which provides that "Lotteries and the sale of lottery tickets are prohibited in this State." Also, it is a commonplace word, and every layman knows exactly what is meant by the term "lottery."

The other information sought by these defendants in their application for particulars was an effort on their part to obtain through this bill the evidence which the State expected to offer on the trial of the case. It goes without saying that such a motion cannot be used for this purpose. The State is not required to reveal in advance of the trial the facts on which it will rely in seeking a conviction. We think that by the bill of information these defendants had been sufficiently informed of the nature and cause of the accusation against them to be able adequately to prepare their defense, and that therefore the trial judge did not commit error in denying their motion for particulars. Likewise there is no merit in Vernaci's demurrer and motion to quash. In these motions she erroneously contends that the bill of information filed against her is vague and indefinite and does not inform her of the nature and cause of the accusation against her. The information in the instant case charges the precise gambling operation in which these defendants were allegedly involved, that is—a lottery; it gives the exact date of the offense and the house number of the place where the offense took place; and in addition it tracks the language of Article 90 of the Criminal Code. Thus it fully meets the test which this court has laid down for determining the sufficiency of an information, that is: It fully informs the court of the offense charged so that it might properly regulate

the evidence sought to be introduced; it informs the accused of the nature and cause of the offense with which he is being charged; and it is sufficient on its face to support a plea of former jeopardy. State v. Scheuering, 226 La. 760, 76 So. 2d. 921, and authorities therein cited.

Mills Bills Nos. 2, 3, 5, 8, and 12 were submitted to this court without oral argument or discussion in brief, and without citation of authorities. Under this state of facts we would be justified in considering these bills abandoned, and probably will do so under similar circumstances in the future. In the instant case, however, we have examined each of these bills and find no merit in any of them.

Mills Bill No. 4 is not mentioned or discussed in brief filed by him in this court, and apparently this bill has been abandoned. It was reserved in connection with certain questions propounded to a witness the State was seeking to qualify as an expert on lottery operations, and to the ruling of the judge permitting this witness to testify as an expert. It is well settled that the trial judge determines whether witnesses offered as experts are entitled to be heard in that capacity, and his ruling will not be disturbed on appeal where no error appears. Art. 466, La. Code Cr. Proc., R. S. 15:466; State v. Carter, 217 La. 547, 46 So. 2d. 897; State v. Nicolosi, 228 La. 65, 81 So. 2d. 771.

Mills Bills 6, 9, 10, 11, 14, 15, and 16 were reserved to the trial judge's permitting the State to file in evidence over the defendant's objection State Exhibits 8 through 14.

Exhibits 8 and 9 are quarterly reports made to the Louisiana Department of Labor, Division of Employment Security, pursuant to the provisions of the Louisiana Unemployment Compensation Law, R. S. 23:1471-1713. Exhibit 8 is for the third quarter of the year 1954, and Exhibit 9 is for the fourth quarter of that calendar

year. These reports are made on printed forms and show the employer's name and business, and give the names, social security numbers, and wages of employees. Both of these documents are quarterly reports for Harold F. Mills, owner of "Gold and Silver," and list Lena Vernaci as one of his employees. According to the testimony in this case, these reports were prepared by an accountant employed by Mills, under Mills' direction and by his anthority.

Exhibits 10 through 13 are tax returns and applications for registry made to the federal government pursuant to the Federal Wagering Tax Law, 26 USCA 4401 et seq., for the period July 19, 1954, to June 30, 1955, which period of time of course included the date of the offense charged in these proceedings. These returns show that the taxpayer is Harold F. Mills and that his business is "Gold and Silver," and are signed by Mills. These returns list Lena Vernaci as one of the employees of Mills. Thee returns show that Mills was engaged in the business of accepting wagers on his own account, and show the amount of wagers accepted during each month of the period covered and the amount of tax due to the federal government.

Exhibit 14 is a certificate by the custodian of the original returns stating that the photostats of these returns are true copies.

The federal wagering tax law pursuant to which these returns were made requires any person engaged in gambling to pay a $50.00 occupational tax, file a registration form listing his name and address and those of his employees, and pay taxes on the gross amount of wagering done. See 26 USCA 4411, 4412, 4401.

The contention was made in the lower court that by filing these state and federal reports Mills was granted an implied promise of immunity from prosecution for gambling. In brief filed in this court Mills does not urge this contention, evidently because there is no merit in it. There is nothinng in the law under

which these documents were filed that carries any implication that compliance will be accompanied by an immunity from prosecution. Moreover, the federal statute specifically provides that the payment of any tax imposed thereby shall not be held to exempt any person from any penalty provided by a law of any state. See 26 USCA 4422. See also Irvine v. California, 347 U. S. 128, 74 S. Ct. 381, 98 L. Ed. 561.

Appellant argues at length in brief in this court, however, that these documents were improperly admitted in evidence because the use of such evidence in a criminal case violates the constitutional rights and guarantees against self-incrimination afforded by the Fifth Amendment of the United States Constitution and Article 1, Section 11, of the Louisiana Constitution.[1]

This contention has been fully answered by the United States Supreme Court in United States v. Kahriger, 345 U. S. 22, 73 S. Ct. 510, 97 L. Ed. 754; Irvine v. California, 347 U. S. 128, 74 S. Ct. 381, 98 L. Ed. 561, and Lewis v. United States, 348 U. S. 419, 75 S. Ct. 415, 99 L. Ed. 475.

In the Kahriger case it was contended that the wagering tax is unconstitutional because it is a denial of the privileges against self-incrimination guaranteed by the Fifth Amendment to the federal Constitution. In answer the Supreme Court of the United States said:

"Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed. 8 Wigmore (3d. ed., 1940) Sec. 2259(c). If respondent wishes to take wagers subject to excise taxes under section 3285, *supra,* he must pay an occupational

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(1) It is the view of the writer that the immunity from self-incrimination granted by the provisions of the Fifth Amendment to the United States Constitution cannot be claimed by defendant in a proceeding in a state court. See dissenting opinion in *State* v. *Dominguez,* 228 La. 284, 82 So. 2d. 12.

tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future hemust fulfill certain conditions."

In the Irvine case the accused was prosecuted in a California state court for violating the state gambling law. Against objection by the accused a federal wagering tax stamp bearing his name and address and his return to the collector under the federal law were introduced into evidence. The accused was convicted, and the United States Supreme Court granted certiorari. The conviction was affirmed. In the course of the opinion the court said:

"Upon his arrest, petitioner had on his person a federal wagering tax stamp bearing his name, home address and the date, November 5, 1951. Against objection, it and other documentary evidence from the office of the United States Collector of Internal Revenue was received to show petitioner's application for the wagering tax stamp and his return to the Collector under the federal law. These documents were made pursuant to the Federal Act imposing wagering taxes, 65 Stat. 529, 26 U. S. C. (Supp. V) Sec. 3285 *et seq.*, held constitutional by this Court in *United States* v. *Kahriger*, 345 U. S. 22. The claim is made that it was error as a matter of federal law to admit this evidence and also that payment of the federal tax resulted in a federal license to conduct the wagering business. This statute does not make such records or stamps confidential or privileged but, on the contrary, expressly requires the name and place of business of each such taxpayer to be made public. 53 Stat. 395, 26 U. S. C. sec. 3275. Petitioner's contentions are without substance or merit in view of the express provisions of the statute that payment of the tax does not exempt any person from penalty or punishment by state law and does not authorize commencement or continuance

of such business. 53 Stat. 395, 26 U. S. C. sec. 3276; 65 Stat. 531, 26 U. S. C. (Supp. V) Sec. 3292."

In a footnote to this case the court commented:

"Petitioner's question number 2, which challenges the State's use of 'compelled evidence' obtained under the federal wagering statute is answered in *United States v. Kahriger* * * *."

The Lewis case, decided in 1955, is particularly in point. An information was filed in a municipal court of the District of Columbia charging Lewis with violation of the federal wagering tax law. The United States Supreme Court held on certiorari that the act as applied to petitioner in the District of Columbia did not contravene the Fifth Amendment's prohibition against compulsory self-incrimination. In the course of this opinion it was stated:

"If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choise. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. If he does not pay the occupational tax, proceeds to accept wagers, and is prosecuted therefor, as in this case, he cannot be compelled to testify and may claim his privileges. The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshhold. They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax."

In support of their position appellants cite and rely on Boynton v. State, 75 So. 2d. 211, decided by the Supreme Court of Florida in 1954. The Florida Supreme Court, however, decided that case before the decision of the United States Supreme Court in the Lewis case, supra, and made no mention of the Irvine case.

Of course, the United States Supreme Court in the

above cases was interpreting the Fifth Amendment to the United States Constitution and dealing with returns made to the U. S. Treasury Department under federal law. However, the reasoning used in these three cases is applicable here, and we are of the opinion that the introduction in evidence in the instant case of the quarterly reports made by Mills to the Louisiana Department of Labor and of the federal wagering tax returns in no way violated defendants' privilege against self-incrimination guaranteed to them by Article 1, Section 11, of our state Constitution. See 14 Am. Jur., "Criminal Law," Secs. 144 and 155.

It is also argued in this court by counsel for appellants that these state and federal reports were improperly admitted in evidence because they are privileged and confidential.

Since it is the duty of every person to give all available evidence to a court, the privilege not to give testimony or to keep documentary evidence out of court is always strictly construed. See Wigmore, Evidence, v. 8, sec. 2285 (3rd ed. 1940). In Louisiana privileges are ordinarily granted by statute. See, e.g., R.S. 15:461 (husband and wife privilege); R.S. 15:476 (physician-patient privilege).

As to the state records, appellants contend that their privilege is rantged by R.S. 23:1660, which is a part of the law requiring that these reports be filed. The clause of this section upon which appellants rely provides:

" * * * Information thus obtained, or obtained from any individual pursuant to the administration of this Chapter except to the extent necessary for the proper administration thereof, shall be held confidential and shall not be published or be open to public inspection (other than to public employees in the performance of their duties) in any manner revealing the individual's or employing unit's identity * * *."

The trial judge in his per curiam says:

"It will be noted that the statute excepts '*public em-*

ployees in the performance of their public duties' from those against whom the prohibition of disclosure is aimed.

"Certainly the District Attorney of the Parish of Orleans, is a '*public employee*'. In the use of these exhibits in the present case, he was engaged in the performance of his 'public duties'."

Although the statute expressly provides that information given in the reports and returns is to be held confidential and shall not be published or open to public inspection, we think, as did the trial judge, that the district attorney in the performance of his public duties falls within the exception provided in the statute. As we have heretofore pointed out, the privileeg to keep documentary evidence out of court is to be strictly construed, and in the absence of an express and clear provision in a statute giving this privilege it will not be recognized. An example of such a clear and explicit provision is R.S. 22:1120(B). That statute makes any communication from an insurer to the Secretary of State a privileged communication which "shall not be used in evidence in any court action or proceeding". See also R.S. 15:461; 15:475; 15:476; 15:477. There is no such provision in the statute upon which the appellants rely, and therefore they have no privilege.

The State in brief informs us that the purpose of the provisions of R.S. 23:1660 is perfectly clear when this section is read as a whole, saying:

" * * * The State wishes to protect employers and their employees from intermeddlers or competitors who would seek to use public records for their own private purposes. On the other hand the State wishes to make the records usable by public officials for public purposes. That is exactly what the act accomplishes in clear terms."

Appellants point out no federal statute providing that the federal tax returns are confidential and privileged, and we know of none. On the contrary, it appears that these returns are open to public inspection under the provisions of 26 USCA 4401 et seq.

Another objection made by appellants to the offering in evidence of these documents is that they are in substance confessions or admissions containing inculpatory statements and as such were improperly admitted in evidence without the proper foundation's being laid for their admissibility. In short, appellants contend that before these documents could be legally introduced in evidence, the State was obliged to show that they were freely and voluntarily given under the provisions of Article 451 of the Code of Criminal Procedure and the jurisprudence of this court.

The tax returns and reports filed in evidence by the State in this case are required by law to be made to a governmental agency to provide the agency with suitable information of transactions which are subject to governmental regulation. They cannot be considered confessions or admissions containig inculpatory statements as these terms are used in Article 1, Section 11, of the Louisiana Constitution, Article 451 of the Code of Criminal Procedure, and in the jurisprudence of this court dealing with incriminating statements for which a predicate must be laid before their admission in evidence.

As said above, the United States Supreme Court has reasoned that the constitutional prohibition against self-incrimination is not applicable to such documents. See Kahriger, Irvine, and Lewis cases, supra. Under that reasoning we hold that the constitutional provision prohibiting the use of confessions unless freely and voluntarily made is likewise without application to such evidence.

It was not the intention of the drafters of the Constitution or the Criminal Code of this state to require that quasi-public records such as these, filed voluntarily with a governmental agency pursuant to law, must be affirmatively shown to have been freely and voluntarily given before being introduced in evidence. In other words, we hold that the provisions of the Constitution and statutes of this state requiring the predicate for the admissibility of a confession to be first laied are without application to the documents in the instant case.

Appellants also objected to the admissibility of these documents because they relate to dates other than that of the offense charegd in the information. They make no argument in support of this objection in brief. This is understandable, as the objection was trivial. The crime here charged is gambling as a business, and this is a continuing offense. The documents were relevant to establish this fact. See infra.

Appellants also objected to the admissibility of the federal tax reports on the ground that since they were photostats of the originals, they were not the best evidence. No argument is made in brief to rationalize this objection, and indeed none could be made. The State points out, and the trial judge tells us in his per curiam, that the original records were not available under federal regulations. The documents offered, however, were certified by the custodian of the originals, an officer of the United States Treasury. Moreover these photostatic copies were compared with the originals, and there was testimony to show that they were identical. Such photostatic copies were the best evidence available, and consequently were admissible under Article 436 of the Code of Criminal Procedure, R.S. 15:436. See also R.S. 15:457; Wharton on Criminal Evidence (12th Ed.), Sec. 591.

Mills Bill No. 7 was reserved to a question put to State's witness Moran, who was asked to identify certain federal wagering tax returns. The witness replied that he had not prepared the documents and knew nothing about them. According to the trial judge's per curiam the witness did not identify the documents, and the question was withdrawn. This bill therefore presents nothing for us to review.

Mills Bill No. 13 and Vernaci Bill No. 5 were reserved to the admission in evidence of State Exhibits 1 through 6, which are the lottery parapharnalia seized by the police officers at the time of the arrest of the defendant Vernaci. As we have already pointed out in our summary of the important facts in this case, these lottery paraphernalia

included a list giving the results of a lottery drawing for Thursday, October 21, showing the numbers drawn from the lottery wheel on that date, as well as other paraphernalia, some dated and some undated.

Mills takes the position that these exhibits were improperly filed in evidence under a bill of information charging the defendants with gambling on October 22. The answer to this contention is that these defendants are charged with gambling as a business which by its very nature is a continuing transaction. Thus this evidence was properly admitted to establish the charge of gambling as a business on October 22.[2] See Art. 446, La. Code Cr. Proc.; State v. Behan, 113 La. 754, 37 So. 714; City of Shreveport v. Marx, 148 La. 31 86 So. 602; State v. Wilde, 214 La. 453, 38 So. 2d. 72; State v. Jouvet, 224 La. 15, 68 So. 2d. 741.

In State v. Jouvet, supra, a witness for the State was asked the question: "When you arrived in New Orleans on the 14th of January, did you play cards at the Gem Club?" Objection was made to this question on the ground that the information alleged that the offense was committed on January 17 and not on January 14. The trial judge overruled the objection and held the question proper. This court in affirming his ruling said:

" * * * The trial judge in his per curiam states that he admitted the testimony to show that the gambling was intentionally conducted as a business. The testimony is relevant for the purpose of showing the continuity of the offense, system, guilty knowledge and criminal intent. R.S. 15:445 and 15:446."

In Bill No. 5, Vernaci contends that the lottery paraphernalia introduced by the State were not identified as her property and were never connected with her, and so were inadmissible. There is no merit in this contention. The paraphernalia were seized in the presence of Vernaci in

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(2) Moreover, in these paraphernalia there were record sheets showing lottery plays or bets bearing the date October 22, the date of the offense as charged in the bill of information.

the room which she leased and occupied, while they were in her possession and under her control. Moreover, the exhibits were identified at the trial as the identical paraphernalia seized on this occassion by the arresting officers. Appellant's objection seems to us to go more to the weight to be given to the evidence than to the question of its admissibility.

Mills Bill No. 17 was taken to the overruling by the trial judge of Mills' exception to the jurisdiction of the Criminal District Court for the Parish of Orleans. According to the trial judge's per curiam this plea was presented to the court after all the evidence had been heard and the case submitted. The basis of the plea is that the evidence does not show that any offense has been committed by Mills in the Parish of Orleans, and that therefore venue of the case is improperly laid in that parish.

Since Mills did not avail himself of his right to have the question of jurisdiction tested before going to trial, but filed this motion only after the evidence had been adduced and the case submitted to the trial judge for decision, the question of jurisdiction became a question of fact, and the sufficiency of the evidence establishing it cannot be reviewed on appeal. It is only where no evidence at all is submitted to establish venue that it may be inquired into by this court. State v. Paternostro, 224 La. 87, 68 So. 2d. 767; Id., 225 La. 369, 73 So. 2d. 177; State v. Heiman, 227 La. 235, 79 So. 2d. 78.

In support of Bill No. 17 counsel for Mills argue that there are three essential elements of a lottery—consideration, prize, and chance—, and that the State must prove "*in limine* the situs of each element". This argument does not merit serious attention. Counsel evidently overlook the fact that these defendants were not charged with the conducting or operation of a lottery *as a crime*. They were charged with gambling as a business denounced by Article 90 of the Criminal Code, in that they conduced a lottery at 1229 Simon Bolivar Street in New Orleans. There is evidence in the record in this case to show that

Mills and Vernaci committed the offense at that place, within the jurisdiction of the trial court. Consequently the question presented—the question of the sufficiency of that evidence—is one of fact which we cannot review.

Mills Bill No. 18 was reserved to the overruling of a motion for a new trial. In this motion Mills alleges that the verdict is contrary to the law and the evidence. It is well settled that a motion for a new trial based on the allegation that the verdict is contrary to the law and the evidence does not present anything for review. Defendant also alleges in support of this bill that the State obtained the conviction solely on circumstantial evidence, that in order to convict on such evidence every reasonable hypothesis of innocence must be excluded, but that the evidence in this case fails to negative certain enumerated hypotheses of innocence. On this point the trial judge tells us in his per curiam, with which we fully agree, that "the contentions of defendant fall within the sufficiency of evidence rule", and they therefore present issues which this court will not review. The other reasons advanced for the granting of a new trial have already been discussed and disposed of in the course of this opinion.

Mills Bill No. 19 was reserved to the overruling of his motion in arrest of judgment. All questions presented by this motion have been fully answered in this opinion, and no further discussion is necessary.

Vernaci Bill No. 4 was reserved in connection with a question asked of State's witness Hatie Tucker. The question was: "Before October 22, 1954, the date these police officers arrested Lena Vernaci, how long had she been using that room before that date?" Counsel for defendant objected to the question, stating that the offense was charged on October 22. The court overruled this objection, and this bill was reserved.

The trial judge in his per curiam tells us: "Proof of the length of time the defendant Lena Vernaci occupied the room, and any and all circumstances concerned with her occupancy was relevant. While neither the question,

or the answer elicited from the witness, even remotely suggested criminality, even if it did, the testimony sought would have been relevant, to show that the defendant did engage *intentionally* in the conduct of gambling as a *business* at the address 1229 Simon Bolivar Street." The judge cited numerous authorities which support his holding.

Vernaci Bill No. 6 was reserved to the overruling by the trial judge of her motion for a new trial, based principally on the allegation that there was no evidence to prove the offense. All of the testimony taken at the trial is in the record, which we have read. Contrary to appellant's contention, there is evidence to support the charge against each of these defendants, and, as we have already said, if any evidence whatsoever on the issue of the guilt or innocence of an accused is adduced before the trial court, the latter's judgment on its weight and sufficiency is final and not reviewable by this court.

Vernaci Bill No. 7 was reserved to the overruling by the trial judge of her motion in arrest of judgment. All questions presented by this motion have been fully answered in the course of this opinion in our discussion of bills reserved either by Mills or Vernaci.

In understanding and answering the contentions raised by defendants' many bills of exception, this court has been given able assistance by the per curiams of the trial judge. The judge set out and explained all the facts and circumstances in connection with each bill, and cited copious authority in support of his rulings on each point. These per curiams show careful study and hard work, and we are grateful for the help which the judge has thus afforded us.

The convictions and sentences are affirmed.

Rehearing refused, May 26, 1956.

A true copy, Clerk's Office, New Orleans, June 18th 1956

V. J. Courville
Clerk Supreme Court of Louisiana

JUN 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 197

GEORGE HABENEY,
Petitioner,

vs.

STATE OF LOUISIANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

FELICIEN Y. LOZES,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

GEORGE HABENEY,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

GEORGE HABENEY prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana, entered February 20th, 1956 in the matter entitled *State of Louisiana* vs. *Michael Callia and George Habeney,* being No. 42,664 of the docket of said Court, involving a prosecution under Louisiana Revised Statutes 14:90, an anti-gambling statute.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Louisiana reported in Advance Sheet No. 6 of 86 So. 2d at page 909 and printed

in the Appendix hereto. The opinion in *State of Louisiana* v. *Harold F. Mills and Lena Vernaci* reported in Advance Sheet No. 6 at page 895 and printed in the Appendix. The judgment of the Criminal District Court for the Parish of Orleans, State of Louisiana, appearing at pp. 4 and 5 of the transcript of the record filed herewith.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered February 20th, 1956; rehearing was denied March 26th, 1956; all of which appears from certified copy of extract from the minutes of the Supreme Court of Louisiana annexed hereto. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3) since the judgment is repugnant to the Constitution of the United States being in derogation of rights and privileges guaranteed by Amendments V, VI and XIV thereof.

Conceding that there is jurisprudence to the effect that the first ten Amendments to the Constitution of the United States are not operative in State courts, (*Maxwell* v. *Dow*, 176 U. S. 581; 44 L. Ed. 597), we believe with Mr. Justice Harlan (*Huartado* v. *California*, 110 U. S. 568; 28 L. Ed. 246; *Maxwell* v. *Dow*, *supra* at pp. 608 and 607 respectively), and many others, that this jurisprudence originally resulted from a forgetfulness, (real or perhaps dictated by seasonable expedience), of the fact that when these Amendments were adopted

> "... the Constitution of each State, with few exceptions, contained and still contains a Bill of Rights, enumerating the rights of life, liberty and property which cannot be impaired by the legislative department."
>
> (Mr. Justice Harlan in the *Huartado* case, *supra*.),

and from the same forgetfulness of the fact that the first ten Amendments to the Constitution merely reaffirmed

> "... that the privileges and immunities enumerated in these Amendments belong to every citizen of the

United States" and that "they were universally so regarded prior to the adoption of the Fourteenth Amendment."

(Mr. Justice Harlan in *Maxwell* v. *Dow, supra.*)

By no rule of reason can it be thought that an acknowledged pre-existing state of facts could be so abruptly changed by the adoption of an Amendment (XIV) the very language of which confirms the existence of these facts. Times have changed. There can be no cause now for any adroitly specious reasoning continuing the formerly expedient denial of rights and privileges existing, in what is now the United States, since the landing of the Pilgrim Fathers and which rights were vigorously reaffirmed in 1791.

QUESTIONS PRESENTED

1. Where a State Statute employs the disjunctive "or" between phrases defining an offense, is a Bill of Information, drawn thereunder, using the conjunctive "and" and thereby failing specifically to indicate which of the disjoined statutory phrases applied to accused, such an accusation as is violative of the right guaranteed, by Amendment VI of the Constitution of the United States, to all accused:

> ". . . to be informed of the nature and cause of the accusation"

and violative of the "due process of law" rights affirmed by Amendment V and Section 1 of Amendment XIV of said Constitution?

2. Is the admitting in evidence against accused of documents confected by a third person, not produced to testify, and to be cross-examined, violative of the rights guaranteed to all accused by Amendment VI of the Constitution of the United States:

> ". . . to be confronted with the witnesses against him",

and violative of Section 1 of Amendment XIV regarding the abridging of

> "... the privileges and immunities of citizens of the United States,"

and "due process of law"?

3. Does the arbitrary affirming of a judgment on the grounds that *all* the questions raised were passed on in another case, when as a matter of fact they were *not*, violate the "due process of law" right and privilege guaranteed by Amendment V and Section 1 of Amendment XIV of the Constitution of the United States?

STATUTE INVOLVED

Louisiana Revised Statutes—LSA. R. S. 14:90, reading:

> "Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.
>
> Whoever commits the crime of gambling shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both."

HOW FEDERAL QUESTIONS RAISED

On February 18th, 1955 a Bill of Information was filed against petitioner and Michael Callia (Tr., pp. 8 and 9) reading in part as follows:

> "... did commit the crime of gambling as defined by R. S. 14:90 in that each did unlawfully and intentionally conduct and directly assist in the conducting, as a business, at 3703 Third Street in the City of New Orleans, of a lottery, whereby a person risked the loss of a thing of value in order to realize a profit, contrary to the form of the statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same."

As the conjunctive "and" was used therein, coupling the words "intentionally conduct" and "directly assist," in-

stead of the disjunctive "or" as appears in the statute, petitioner filed on March 28th, 1955 (Tr., pp. 1 and 2) an application for a Bill of Particulars (Tr., p. 121) seeking information as to the "nature and cause of the accusation", namely—was he accused of

1. *Conducting* a lottery;

OR

2. Directly *assisting* in the conduct of a lottery.

This application was denied by the District Court June 2nd, 1955 (Tr., p. 3) and a Bill of Exception No. 1 was seasonably reserved (Tr., p. 3) and filed. (Tr., p. 142.) Thereupon, petitioner, verbally through counsel, filed a Motion to Quash the Information on June 2nd, 1955, and demurred, on the same date, to the proceedings, all on the same grounds, that he had not been specifically informed of the "nature and cause of the accusation." (Tr., pp. 3 and 4) On June 28th, 1955, by agreement, the Motion to Quash and the Demurrer were filed in writing. (Tr., pp. 5 and 132) were overruled and Bill of Exception No. 2 was seasonably reserved, (Tr., pp. 3 and 6) and filed (Tr., p. 145).

Petitioner was tried and convicted on June 2nd, 1955, and on July 6th, 1955 filed a Motion for a New Trial (Tr., pp. 6 and 137), which was overruled and Bill of Exception No. 7 seasonably reserved (Tr., p. 6) and filed (Tr., pp. 165 and 166).

During the course of the trial on June 2nd, 1955 there were placed in evidence by the State exhibits marked State Exhibits 8 through 24, being documents and papers confected by persons other than petitioner (Tr., p. 244), over objection by petitioner (Tr., p. 244) and Bill of Exception No. 6 was reserved (Tr., p. 246) and filed (Tr., p. 161).

On August 15th, 1955, petitioner was sentenced (Tr., p. 7) and thereupon filed a motion for suspensive appeal (Tr., p. 140) which was granted. (Tr., p. 7).

The appeal was argued before the Supreme Court of Louisiana and on February 20th, 1956 the judgment of the Criminal District Court was affirmed. The opinion stated that all of the questions raised had been raised and acted upon in the matter of *State of Louisiana* v. *Harold F. Mills and Lena Vernaci*, No. 42,663 of the docket of said Court, (the opinion being printed in Appendix A hereto). This was not true as the point raised by question 2 herein was not raised in the *Vernaci* case. Nevertheless, on March 26th, 1956 a rehearing was refused.

STATEMENT OF CASE

As facts of the case pertinent to this petition are set out in detail in the section hereof entitled "How Federal Questions Raised", *supra*, it is unnecessary to repeat them here.

REASONS FOR GRANTING WRIT

1. The judgment of the Court below is based on a Bill of Information which is violative of petitioner's right "to be informed of the nature and cause of the accusation," in that the statute under which it was drawn provides two separate and distinct methods of violation, incapable by their nature of combination, while the Bill of Information charges petitioner with the impossibility of being guilty of both violations at the same time.

The Statute, Louisiana Revised Statutes—LSA. R. S. 14:90, reads:

> "Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.
>
> Whoever commits the crime of gambling shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both."

The Bill of Information drawn thereunder (Tr., p. 8) reads:

> "Edward A. Haggerty, Jr., Assistant District Attorney for the Parish of Orleans, who in the name and by the authority of the said State, prosecutes, in this behalf, in proper person comes into the Criminal District Court for the Parish of Orleans, in the Parish of Orleans, and gives the said Court here to understand and be informed that one
>
> Michael Callia and one George Habeney, each, late of the Parish of Orleans, on the sixth day of December in the year of our Lord, one thousand nine hundred and fifty-four with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans, did commit the crime of gambling as defined by R. S. 14:90 in that each did unlawfully and intentionally conduct and directly assist in the conducting, as a business, at 3703 Third Street in the City of New Orleans, of a lottery, whereby a person risked the loss of a thing of value in order to realize a profit, contrary to the form of the Statute of the State of Louisiana in such case made and provided and against the peace and dignity of the same.
>
> (Signed) Edward A. Haggerty, Jr., Assistant District Attorney for the Parish of Orleans."

2. The first ten Amendments of the Constitution are but a reaffirmation of rights, privileges and immunities enjoyed by the people long before the adoption of the Amendments, and contain no clauses restricting their effect solely to the Federal authority or contradicting Article VI of the Constitution which specifically states:

> "This Constitution . . . shall be the supreme law of the land."

3. Amendment VI specifically uses the word "State" in the phrase:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an im-

partial jury of the *State* and district wherein the crim shall have been committed . . ."

Applying the well established rule that criminal statute must be strictly construed, the presence of the wor "State" therein forbids, certainly as to this Amendmen any specious reasoning leading to the conclusion that it i inoperative in State courts.

4. Section 1 of Amendment XIV provides that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *Citizens of the United States* and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States* . . ."

5. The right "to be informed of the nature of the accusation" is a right and privilege always enjoyed by and merely re-affirmed for the citizens of the United States by Amendments VI and XIV of the Constitution. (*Maxwell* and *Huartado* cases, *supra*)

"It seems to me that the privileges and immunities enumerated in these Amendments belong to every citizen of the United States. They were universally so regarded prior to the adoption of the Fourteenth Amendment. In order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, and secure the blessings of liberty to themselves and their posterity, the political community known as the people of the United States ordained and established the Constitution of the United States; and every member of that community was a citizen of the United States. It was that community that adopted, in the mode prescribed by the Constitution, the first ten Amendments; and what they had in view by so doing was to make it certain that the privileges and immunities therein specified—the enjoyment of which, the fathers believed, were necessary in order to secure the blessings of liberty—could never

be impaired or destroyed by the national government."

(Justice Harlan in *Maxwell* v. *Dow, supra.*)

6. "Every man should be able to know with certainty when he is committing a crime", (*U. S.* v. *Reese,* 92 U. S. 214; 23 L. Ed. 563), for,

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." (*U. S.* vs. *Reese, supra.*)

7. Turbulent times give rise to situations requiring, upon occasion, devious legal reasoning in order to reach a conclusion not fraught with the possibility of widespread violent reaction. There is little doubt that the comparatively recent dreadful events preceding the adoption of the Fourteenth Amendment weighed heavily on the minds of the Court first relegating to oblivion the fact that "the privileges and immunities enumerated in these Amendments" (the first ten) "belong to every citizen of the United States" and "were universally so regarded prior to the adoption of the Fourteenth Amendment." (Justice Harlan in the *Maxwell* case, *supra*). Perhaps these memories also had some bearing on subsequent decisions, but in these modern times, remote from the painful birth of the Fourteenth Amendment, adherence to a position so untenable, historically and reasonably, can only be explained by "policy of the Court." It is suggested that "policy" is subject to change as conditions warrant. Had "policy" been unalterable, we would have no Buddhism, no Mohammedanism, no Christianity. Had "policy" remained immutable, indeed we would not have these United States of America.

8. Petitioner objected to the introduction of certain written evidence on the ground that he was entitled to be confronted with the witness, the confector of the documents in question.

The Supreme Court of Louisiana summarily affirms the judgment herein with the words:

> "All of the questions raised in these bills of exception were raised and passed on in the case of *State* v. *Mills*, 228 La. ..., 86 So. 2d 895. It could serve no useful purpose to reiterate the questions raised and the conclusions reached by this Court because the same conclusions would necessarily have to be reached in this case."

There could be no quarrel with that pronouncement if it were true, but the fact is that the Constitutional right

> ". . . to be confronted with the witnesses against him"

was not raised in the *Mills* case. Of this we are positive as counsel herein were also counsel in the *Mills* case. This action of the Court below may have been accidental but it still remains a flagrant disregard of petitioner's Constitutional rights and privileges.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Certificate

At New Orleans, Louisiana, on this 20th day of June, 1956, I, George M. Ponder, a duly commissioned Assistant Attorney General for the State of Louisiana, hereby accept service on the above and foregoing petition for Writ of Certiorari.

GEORGE M. PONDER,
Assistant Attorney General.